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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 90 of
the Commission's Rules to
Facilitate the Future
Development of SMR Systems
in the 800 MHz Frequency Band

PR Docket No. 93-144

COMMENTS OF PACTEL PAGING

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SUMMARY

Pactel Paging ("PacTel") is commenting on the proposed rule changes in PR Docket No. 93-144 to promote continued growth of the 800 MHz SMR industry. Generally, PacTel supports the Commission's efforts to facilitate the aggregation of channels throughout a broader geographic region in a manner that will foster the implementation of advanced technologies. However, some changes in the proposal should be made to avoid unintended consequences.

The Commission should be encouraging new market entry by qualified service providers rather than dictating the identity of wide-area 800 SMR operators through the proposed licensing scheme which is skewed so heavily in favor of incumbents. Also, the Commission should not adopt the Major Trading Areas (MTAs) as the relevant licensing area for to do so will create too many conflicts among and between the many existing 800 MHz SMR in regions of this size.

PacTel also offers comments on the manner in which the Commission should structure its rules to foster prompt system implementation and the use of advanced technologies.

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states. PacTel also held SMP licenses prior to the expiration of

substantial experience and a legitimate interest in commenting on the Notice.

**I. Innovative Wide-Area SMR
Operations Should Be Encouraged**

3. The Commission's Notice is intended to facilitate the aggregation of SMR channels throughout wider geographic areas and to encourage the use of advanced technologies to permit SMR carriers to provide efficient, state-of-the-art services.^{4/} PacTel enthusiastically supports this objective. PacTel's operating experience confirms that customers are demanding improved mobile services throughout an ever-increasing geographic range of coverage.^{5/} The implementation of wide-area services requires the use of sophisticated radio engineering and transmission techniques in order to increase system capacity to a point that will sustain the increased infrastructure costs

4. PacTel also believes that the accommodation of wide-area SMR systems utilizing advanced technologies is best achieved through rule changes rather than by continuing the ad hoc waiver policy that has been employed to encourage such developments to date.^{2/} Thus, PacTel offers its support for the objectives the Commission is seeking to advance. At the same time, there are some aspects of the proposal that, in PacTel's

territories.^{8/} A key element of this proposal is to initially restrict eligibility for EMSP licenses to those entities who are current licensees of 800 MHz SMR systems within any small portion of the expanded service area.^{9/} Under the Commission's proposal, entities or licensees of 800 MHz SMR stations on or before May 13, 1993, the date the Notice was adopted, would be eligible for this initial licensing preference.^{10/}

6. PacTel is concerned that an 800 MHz SMR licensing scheme that provides a *de jure* licensing preference to incumbent license holders may not serve the public interest.^{11/} The public interest is better served by adopting policies which permit open entry and full competition.^{12/}

^{8/} Notice at ¶9.

^{9/} The Commission is seeking comment on whether the appropriate geographic area for EMSP licenses is the 47 Rand McNally Major Trading Areas ("MTAs") or, in the alternative, the 487 Rand McNally Basic Trading Areas ("BTAs"). As indicated in Section III within, PacTel supports the use of the BTA as the licensing region.

^{10/} Notice at ¶24.

^{11/} This license preference is unlike the pioneer preference and finders preference which are currently part of the Commission's Rules. Those preferences were based upon the expenditure of money by the applicant to further the public interest either by developing new technologies and services or reclaiming unused spectrum. See Sections 1.402 and 90.611(d). The preference proposed here, however, is based solely upon the applicant being a licensee before a particular date. Indeed, this might reward licensees who have not been at the forefront of development by allowing them to expand their systems without competition.

^{12/} It is PacTel's belief that there was considerable speculation in 800 MHz SMR licenses going on prior to May of
(continued...)

7. The Notice offers three rationales for restricted initial eligibility. First, the Commission states that "the public would benefit from a more viable and expeditiously provided EMSP service by permitting existing licensees first to convert their existing systems to wide-area operations".^{13/} Second, the Commission tentatively concludes that the "extensive infrastructure" which existing licensees already have in place "will as a practical matter be the foundation for any quality EMSP offering".^{14/} Finally, the Commission expresses concern that licensing new entrants will create gaps in service since they would have to protect existing licensees.^{15/} However, these considerations do not justify the restrictive policy the Commission is advocating.

8. When faced with a similar circumstance in the past, the Commission found that the public interest was better served by open entry. For example, the position of an existing 800 MHz SMR licensee interested in expanding service into previously unavailable territories is no different than the interest of an MSA cellular licensee in expanding into adjoining RSAs or unserved areas as they became available. Not

^{12/} (...continued)

surprisingly, MSA cellular operators specifically proposed to the Commission in the course of the adoption of the RSA licensing rules that incumbent licensees be given a licensing preference when proposing to expand into adjoining areas. The Commission rejected this approach, concluding that fostering new entrants and new competition would better serve the public interest.¹⁶

9. The cellular MSA/RSA experience also serves to contradict the rationale that wide-area 800 MHz SMR systems

operators.^{17/} It is not necessary for the incumbent licensee to also become licensed in the adjoining territory.^{18/}

10. Adopting restricted eligibility is not necessary to avoid gaps in coverage. If new entrants are eligible for wide-area licenses, both the incumbent licensee and the newcomer to an extended area will have a substantial competitive incentive to reach cooperative arrangements that will enable gaps between systems to be filled in on a non-interfering basis.^{19/} Again, the MSA/RSA cellular experience indicates that carriers will cooperate to provide seamless service in accordance with subscriber needs.^{20/}

^{17/} Adjoining licensees are always incented to interconnect with each other. The cellular market is a good example of this phenomenon. The cellular industry has extensive roaming arrangements which allow a cellular user to roam nationwide without having to make arrangements with each new system. PacTel foresees that such arrangements will occur in the EMSP arena as well as long as the Commission does not restrict such arrangements.

^{18/} Preferred licensing for incumbents may pressure some to seek to expand beyond their financial limits to the detriment of the public. The SMR industry has considerable numbers of entrepreneurial operators who do not have the necessary cash to undertake the extensive build requirements suggested by the Commission.

^{19/} Once again, the Commission should encourage licensees to make such arrangements even if restricted eligibility is ultimately adopted. Cellular has been enormously successful because such arrangements occurred.

^{20/} Ironically, the Notice recognizes that cooperation between carriers is possible by according "mutually exclusive" EMSP applicants sixty days to work out a cooperative arrangement that resolves their frequency conflict. Notice at ¶30. The Commission has failed to explain why existing licensees are expected to be capable of reaching joint operating

(continued...)

11. Any perceived benefit of adopting initial eligibility restrictions wanes in the face of the prospect for competitive bidding to award EMSP licenses.^{21/} If, as the Commission surmises, wide-area licenses prove to be more valuable to existing licensees who can rely upon their existing infrastructure and customer base to expand a service efficiently, then they will be in a position to pay more in the competitive bidding process.^{22/} PacTel recommends that the Commission allow the marketplace (through competitive bidding) to decide who should get these licenses rather than having the Commission predetermine the outcome through licensing restrictions. Leaving aside the potential positive revenue implications of open entry,^{23/} market theory would suggest that the Commission's objectives of getting licenses into the hands of those best positioned to exploit them is better accomplished through the

^{20/} (...continued)

agreements, while incumbent licensees and newcomers are not.

^{21/} Congress is currently considering legislation that would permit the Commission to use competitive bidding to select licensees for mutually exclusive applications. See S.335 and H.R. 170 Applicants who file for the same frequency in the same would be considered mutually exclusive. In light of the legislation, the Commission should adopt broader eligibility requirements to ensure the widest possible number of bidders.

^{22/} By adopting restrictive eligibility requirements, the Commission could be limiting the ability of the market to select the best possible licensee. This may not serve the public interest.

^{23/} Intuitively, the auction price would likely increase as the number of potential bidders went up.

competitive bidding process than through artificial restrictions on licensing eligibility.^{24/}

**III. The Commission Should Utilize BTAs
as the Relevant Market for EMSP Licenses**

12. The Notice tentatively concludes that licensing 800 MHz SMR wide-area systems based on either a BTA or MTA approach would serve the public interest.^{25/} The Commission seeks comment on whether the MTA or the BTA better reflects the likely scope of market demand for EMSP licenses.^{26/} The Commission also seeks comment on the geographic economies of scale necessary to allow a licensee to provide complete state-of-the-art service.^{27/}

13. PacTel's operating experience confirms that customers seek coverage for mobile radio services over ever-increasing geographic areas. Consequently, PacTel has

^{24/} If, for any reason, the Commission elects to proceed with its initial licensing restrictions as proposed in the Notice, PacTel respectfully requests an exception for any company whose eligibility for 800 MHz SMR licenses was previously restricted by Commission rule. The preference in favor of incumbent licensees disservices the public interest when applied to a company, such as PacTel, who was denied the ability to hold an 800 MHz SMR license prior to May 13, 1993, and thus was unable to meet the eligibility restriction. This problem could, of course, be mitigated by

historically supported the adoption by the Commission of larger as compared to smaller licensing areas.²⁴ However, the 800 MHz SMR service presents a quasi-unique circumstance. PacTel is concerned that adopting licensing areas as large as MTAs would not serve the public interest because it would eliminate meaningful licensing opportunities for new market entrants. such

serving the public interest by allowing existing licensees and newcomers to have meaningful opportunities for a license.^{31/}

**IV. Rules Must be Adopted to Foster Prompt
System Implementation and Efficient Uses**

14. The Notice properly recognizes that EMSP licensees will need an extended implementation period (five years) to construct the contemplated systems. PacTel concurs. Licensees of systems of this complexity should be given a reasonable opportunity to construct the system. It is critical, however, for extended implementation schedules of this nature to be accompanied by stringent construction requirements so that the risk of spectrum remaining fallow for extended periods of time is reduced.^{32/}

15. The Commission proposes that an 800 MHz EMSP system be required to ultimately cover either 80% of the land area or serve 80% of the population within the relevant BTA/MTA.^{33/} PacTel generally supports this requirement, but

^{31/} Furthermore, BTAs fit the current licensing environment better. SMR licensees do not necessarily have operations even in the major metropolitan areas of the MTA. For example, Los Angeles SMR licensees may not be licensees in San Diego, which is a part of the Los Angeles MTA.

^{32/} This is the problem, of course, with all extended implementation schedules. The public interest requires a

believes that the proposed penalty for failing to meet this standard may not be sufficiently harsh to deter speculation. Also, the public interest requires that any such construction requirement fall equally on existing licensees and new licensees.

16. The Notice proposes to allow an EMSP licensee who fails to meet the construction requirement to retain and continue to operate any stations already constructed and in operation and that these facilities would be entitled to co-channel protection. The licensee would, however, forfeit the ability to continue constructing or modifying stations on these channels throughout the BTA/MTA. Limiting the "penalty" in this fashion may result in "cherry picking" by which licensees construct in only the most populous and well-travelled corridors, leaving large areas of the MTA/BTA unserved.^{34/} This could contradict the Commission's statutory charge of fostering a truly efficient nationwide service.^{35/}

17. The Commission may wish to consider other stricter requirements to encourage EMSP licensees to build out most if not all the wide-area license area. For example, interim construction benchmarks could be established to assure that licensees were proceeding with system implementation at a responsible pace. A mechanism also could be added for channel

^{34/} PacTel suggests that existing operators could also be speculators in this frequency because they could be filing for spectrum without any real perceived need for the spectrum.

^{35/} Communications Act of 1934, as amended, Section 1.

takebacks in a particular area if an EMSP licensee who had met its construction requirements was barred from assembling a full complement of 42 channels due to construction by another EMSP licensee who had failed to fully construct. Or, an EMSP licensee who failed to construct the minimum necessary facilities could be required to negotiate in good faith to allow subsequent licensees in unbuilt areas access to the partially constructed system. Alternatively, the penalty for failing to meet the construction requirement could be complete license forfeiture of all new facilities.^{36/} Requirements of this nature would help assure that only applicants with a *bona fide* interest in establishing a truly wide-area service throughout the MTA/BTA will apply, and will also foster universal service.^{37/}

18. The Commission also proposes to credit existing licensees with coverage provided over facilities built prior to the filing of the EMSP application. This may not serve the public interest. The Commission must encourage applicants to extend service into previously uncovered areas. Consequently, no applicant should get credit for pre-existing facilities in demonstrating compliance with the construction requirement.^{38/}

^{36/} An existing licensee which files for a EMSP license and fails to construct half of the new stations would lose the license to all of the new stations, but would retain any local area SMR license held prior to the EMSP filing.

^{37/} This is the so called "death penalty" for licensees.

^{38/} This would also ensure a level playing field between existing licensees and new licensees. Without such a
(continued...)

19. The Notice proposes that EMSPs not be required to meet any particular mobile loading standard.^{39/} This conclusion is based in large part on the recognition that the Private Radio Bureau's traditional "mobile per channel" measurement of spectrum usage fails to provide a relevant measure of a system's utilization. PacTel supports the Commission's view that the traditional "Mobile Per Channel" measurement would fail to adequately measure the use of the spectrum. If the Commission, however, believed that the public interest requires some form of usage standard, PacTel suggests that the appropriate measurement be either a busy hour analysis akin to what is performed in Part

^{38/} (...continued)

leveling of the field, the new licensees would bid substantially less for the spectrum because they would have to incur the costs of constructing all of the facilities, whereas the existing licensees would not be encouraged to bid any more because they would have no incentive to do so.

^{39/} Notice at ¶37.

22,^{40/} or a basic number of units in service by the public on the system.^{41/}

20. PacTel also agrees with those parties who recommend that wide-area licenses only be granted to applicants that will utilize advanced technology.^{42/} The 42 channel mark the Commission mentions as the smallest block of channels necessary for a licensee to construct an economically viable wide-area system derives from petitions and comments in earlier waiver proceedings where the proponents were planning to implement higher capacity digital systems. It would make no sense for the Commission to grant 42 channels to a licensee who would utilize an outdated technology incapable of achieving the

^{40/} See Section 22.516. As a carrier with extensive radio common carrier facilities, PacTel has had substantial experience in the preparation and submission of traffic loading studies to the Commission. The necessary data, in most instances, is generated automatically by the terminal facilities and can be assembled easily. Notably, traffic utilization studies do not suffer from the same inaccuracy as arbitrary mobile unit-per-channel benchmarks. If the Commission believes the public interest requires such a measurement, EMSPs could provide periodic loading data indicating the percentage of their total channel airtime that is occupied during representative busy hour periods in areas where all available channels have been licensed. In conjunction with such a requirement, the Commission could also adopt rules that would permit channels to be taken back and assigned to other eligible interested carriers unless a certain percentage of total airtime (perhaps 10%) is being utilized during peak usage periods.

^{41/} This is the standard used in the common carrier arena.

^{42/} Notice at ¶38.

economies of scale upon which the 42 channel grant was based.^{43/} Based on the foregoing considerations, the public interest would be best served by the Commission mandating that EMSPs use advanced technology. The criterion proposed by AMTA that applicants certify they will use technology that provides at least twice the capacity of analog technology appears reasonable to PacTel.^{44/}

21. Finally, PacTel agrees that the Commission should use bonds as a mechanism for assuring compliance with the Commission's construction coverage and loading requirements.^{45/} However, as PacTel has noted in other Commission proceedings,^{46/} making provision for a forfeiture bond rather than a performance bond is more reasonable and defensible.^{47/} The Notice purports to relate the amount of the performance bond to the loss that

^{43/} This is especially true when the Commission mandates an 80% coverage requirement. Licensees will be incented to use the least costly equipment to meet their construction requirements.

^{44/} Notice at ¶38.

^{45/} Seed Notice at ¶40.

^{46/} In commenting on Commission proposals with regard to the 900 MHz SMR NPRM (PR Docket No. 89-553), the Narrowband PCS NPRM (ET Docket No. 92-100) and the PCP Exclusivity (PR Docket No. 93-35) proceeding, PacTel has advocated the use of forfeiture bonds to insure compliance with applicable construction requirements.


^{47/} As PacTel mentioned in those earlier proceedings, a forfeiture bond follows the Commission's current guidelines for forfeitures and thus ensures that it is defensible. Further, it is licensee independent. Thus, licensees can not make lowball estimates of the number of transmitters to give the lowest possible bond.

would be suffered by the public in the event a licensee fails to construct.^{48/} It would be difficult, however, for the Commission to articulate how it went about calculating the loss suffered by the public in this circumstance.^{49/} The Commission would be on surer ground if it implemented a forfeiture bond mechanism.

22. Section 403 of the Communications Act of 1934, as amended, sets base forfeiture amounts for failing to comply with a Commission rule or regulation. Using these as a guide, the Commission could set a base forfeiture amount associated with a failure to construct any facility required to meet the coverage benchmark. This structure would appear to put the Commission well within the framework of well-known forfeiture guidelines. As long as 800 MHz SMR licensees are required to construct a certain number of facilities, then the Commission may properly impose fines and forfeitures when the licensee fails to satisfy these stated requirements. As the Commission has proposed with its performance bond, portions of the forfeiture bond could be returned to the licensee as construction proceeded.

23. PacTel also believes that the public interest would be better served by leveling the field between existing and

construction requirement.⁵⁰ Unfortunately, the net effect of



VI. Conclusion

24. PacTel submits that the adoption of rules consistent with these comments will result in a licensing scheme that encourages the prompt development of advanced wide-area 800 MHz SMR systems, while according licensees the flexibility necessary to meet changing subscriber demands.^{51/}

Respectfully submitted,

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^{51/} The Notice proposes that licensees would be precluded from assigning their license at least for three years, and in no event before construction has been completed. Notice at ¶42. The Commission proposes that licensees would, however, be permitted to lease their spectrum to third parties. This leasing authority vitiates the anti-alienation rule because purchasers will enter into these agreements prior to the lapse of the anti-alienation period, so as to get the benefits of the system prior to actual ownership. On balance, PacTel urges the Commission not to impose post-grant transfer restrictions on successful applicants. No licensing scheme is perfect. There will always be instances in which deserving applicants do not receive the licenses of their choice, and where licenses end up going to other than the most qualified providers. Inequities of this nature cannot be cured by market forces if the Commission imposes arbitrary restrictions on the assignment or transfer of licenses.